



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF K-P- INC

DATE: AUG. 14, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an outsourcing services business, seeks to employ the Beneficiary as technical project manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage from the priority date onward. The Petitioner filed a motion to reopen and a motion to reconsider. The Director granted the motion to reopen, but found that the Petitioner had not overcome the grounds for denial and affirmed his previous decision to deny the petition.

On appeal the Petitioner asserts that the evidence previously submitted establishes its ability to pay the proffered wage.

Upon *de novo* review, we will withdraw the Director’s decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date¹ of the petition onward. The priority date in this case is March 16, 2017. The labor certification states that the wage offered for the job of project technical manager is \$142,688 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case, the labor certification states that the Beneficiary started working for the Petitioner in December 2015, before the priority date. The Petitioner has submitted copies of the monthly pay statements it issued to the Beneficiary from March through December 2017, the last of which shows that the Beneficiary received "regular" pay totaling \$95,500 for the year. This figure was \$51,188 below the proffered wage.

If a petitioner has not employed the beneficiary and paid him (or her) a salary equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statement(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the

¹ The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. See 8 C.F.R. § 204.5(d):

beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year.

In this case the record includes a copy of the Petitioner's federal income tax return, Form 1120S, U.S. Income Tax Return for an S Corporation, for 2016, which was the most recent filed by the Petitioner at the time of the Director's decision and the subsequent appeal. However, without the Petitioner's 2017 federal tax return (or an annual report or audited financial statement for 2017) we are unable to assess the Petitioner's ability to pay the proffered wage to the Beneficiary from the priority date of March 16, 2017, onward. Accordingly, we will remand this matter to the Director to request regulatory required evidence, as specified in 8 C.F.R. § 204.5(g)(2), of the Petitioner's ability to pay the proffered wage in 2017.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of K-P- Inc*, ID# 1604120 (AAO Aug. 14, 2018)